COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy

The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

Submission of manuscripts

Manuscripts should be submitted together with a covering letter to the Managing Editor. They must be accompanied by written assurance that the article has not been published, submitted or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks. Digital submissions are welcomed. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotations should be no longer than 10 pages (approx. 3,000 words). Details concerning submission and the review process can be found on the journal's website http://www.kluwerlawonline.com/toc.php?pubcode=COLA

Carl Fredrik Bergström and Dominique Ritleng (Eds.), *Rulemaking by the European Commission. The New System for Delegation of Powers*. Oxford: Oxford University Press, 2016. 320 pages. ISBN: 9780198703235. GBP 60.

In this book, the editors bring together an interdisciplinary group of legal and political science scholars to reflect on the changes introduced by the Lisbon Treaty to comitology (i.e. Arts. 290 and 291 TFEU). The book as a whole and the individual contributions make a very interesting read and will give the reader a complete picture of the major legal and political questions in this field. One word of caution has to do with some recent developments which the authors and editors could (logically) not integrate in the contributions but which affect many of the questions dealt with, such as the final text of the 2016 Common Understanding (CU) on delegated acts and a number of cases before the GC and ECJ, inter alia the *Visa reciprocity* case (C-88/14). Finally, readers of the book may be puzzled by its cover, explained on p. xxviii. It is unclear however whether the authors are themselves convinced that Parkinson's law, which views bureaucracies rather pejoratively, indeed captures the topic of EU comitology (which in any case is something different from the "comitology" which Parkinson wrote about).

Bergström's introduction presents a very well written overview of the history and context of comitology, giving the reader a basis for the topics and problems discussed in the book's subsequent chapters. The lack of cross-referencing (in other chapters) to this introduction then seems a bit of a missed opportunity to make the volume more coherent. As it is, many of the chapters still contain (after a couple of redundant chapters) a discussion of the changes introduced by the Lisbon Treaty. On the other hand, this also means that every chapter can be read on its own.

The following three chapters focus on the three political institutions. Jacqué presents an insightful overview of the evolution in the approach to executive rulemaking, comparing the EU's executive federalism with experiences in the US and Germany (pp. 24–27). The chapter also contains some controversial statements which a reader unfamiliar with the topic may not, however, recognize as such: qualifying the Council as the main executive actor at EU level might have merited further references to some of the opposing views on this issue, e.g. those defended by Blumann. Jacqué evidently takes a Council perspective when he finds that the legislator decides to delegate implementing powers to the Commission (p. 23), but this can be questioned on the ground that a legislator *confers* (not delegates) implementing powers and that Article 291 may have objectivized the issue of whether powers should be conferred or not. The contribution contains an insightful and rare discussion of how the Commission's original proposal for the new Comitology regulation was significantly amended (pp. 33–35). Finally, it should be noted that some of Jacqué's statements (on the notion of amendment and the margin of discretion exercised by the Commission under Arts. 290 or 291) may require revision in light of recent decisions by the Court in *Visa reciprocity* and Case C-286/14, *Connecting Europe Facility* (pp. 29–30).

Representing the Commission's view, Ponzano hails Lisbon's reform (p. 38). Similar to Jacqué, Ponzano represents the difference between Articles 290 and 291 as one of little-to-no (291) or significant (290) discretion (pp. 38–40). Again, *Visa reciprocity* will be relevant here. At the time of finalizing the chapter, the new (2016) CU had evidently not yet been concluded, but Ponzano already foretells that a *de facto* comitology procedure would be reintroduced (p. 44). Regarding the difficult question of the delimitation between delegated and implementing acts (p. 48 et. seq.) Ponzano discusses Case C-427/12 *Biocides*, rightly stressing that the Court ruled that "the concept of an implementing act . . . must be assessed in relation to the concept of a delegated act". However, here again *Visa reciprocity*, in which the Court did not stress this link anymore, should be noted. In the conclusion, Ponzano convincingly argues in defence of Lisbon's reform but equally foretells that the Court's case law will push in the direction of a "consensual practice between the institutions".

In a richly documented piece, Bradley gives an insight into how Lisbon affected European Parliament (pp. 55–57), looking at the origins of the notion of essential elements (pp. 58–59). Discussing the *Schengen Borders* case (Case C-355/10), Bradley convincingly argues that that decision should be welcomed for its confirmation that the question of essential elements should be treated like the legal basis question (p. 60). While Bradley does not suggest that *Meroni* should be applied to this issue, drawing analogies with that case remains risky given the fundamental difference between the Commission (under Art. 290) and the private law bodies in *Meroni* (pp. 60–61). Bradley further rejects the idea that implementing acts could be used to implement a delegated act (p. 63) (Bast in Ch. 8 also doubts this). According to Bradley, the two control mechanisms in Article 290 can be further complemented, citing the procedures involving the ESAs (pp. 68–70), but this precisely raises the question of whether these procedures do not undermine the Commission's prerogatives. Interestingly, Bradley also argues that the Member States' control under Article 291(3) "contravenes the logic underlying the constitutional and institutional structure of the Union", arguing (political) control should be exercised by the European Parliament (pp. 68–70). This results from Bradley's reading of Article 291(1) TFEU as confirming an obligation rather than a prerogative of a Member State to implement EU law. Readers will appreciate Bradley's insightful discussion of the possibility of conferring implementing powers on the Council in Article 291(2) TFEU and the Appeal Committee in the examination procedure (pp. 71–75). Unlike Jacqué and Ponzano, Bradley further rejects the "margin of discretion" as a useful criterion to draw the distinction between Articles 290 and 291 TFEU (pp. 78–81). Controversially, Bradley (different from Bast in Ch. 8) also reads a hierarchy in Articles 289, 290 and 291 TFEU (p. 81).

The chapter by Christiansen and Dobbels presents a very interesting analysis of the actual institutional practice, identifying four contentious practical issues: (i) the legislature's choice between empowering under Articles 290 or 291 TFEU, (ii) the reliance on expert groups under Article 290 TFEU, (iii) the control mechanisms of Article 290 TFEU, and (iv) the appeal committee in the examination procedure. They tentatively conclude that the potential for inter-institutional conflict has not undermined the efficiency of executive decision-making (p. 91). The reader may wonder however whether a lot of the inter-institutional conflict was not "fought out" in the increasingly important trilogues, to which the authors presumably could not access. This issue would be worth pursuing further.

The chapter by Héritier, Moury and Granat draws our attention to the fact that once formal rules are adopted, they are subject to formal and informal change. The authors focus on the latter and convincingly argue that such informal change is worth studying since it is often later codified in formal rules, and that particularly Articles 290 and 291 deserve attention since they form an incomplete contract (p. 107). The authors present four case studies offering very interesting new insights: under the six-pack, the institutions created a hybrid procedure while the national parliaments' opinions on delegation issues under Protocol No. 2 are shown to merit further scholarly attention. However, as regards the case study on IPA, the authors claim that the institutions resorted to a new type of amending delegated act but it is not entirely clear in what way it is really different from what is already foreseen in Article 290. The authors' argument is also difficult to trace back, given the lack of references to the Commission's (amended)

proposals, European Parliament (committee) positions, etc. Still this political science chapter is a very welcome addition to the volume and helps the reader appreciate how the institutions have worked with, within or outside the legal framework.

The chapter by Ritleng discusses the concept of essential elements which Lisbon codified in EU primary law. This chapter is an example of EU legal scholarship at its best: richly documented from multi-lingual sources and drawing on comparative analysis. Based on *Biocides* and *Visa reciprocity*, Ritleng *inter alia* develops an interesting new argument on why the non-delegation doctrine of Article 290 should also apply to 291 (pp. 144–145), to the materially (but not formally) legislative acts adopted by the EU institutions (pp. 145–148), and to acts adopted by EU agencies (p. 148). The chapter concludes with an insightful discussion of the *Schengen Borders* case, clarifying the extent to which interference with fundamental rights necessarily touches on the essential elements of legislation.

In Chapter 8, Bast builds on his excellent earlier work (see 49 CMLRev., 885–927) refuting the idea of a hierarchy between Articles 290 and 291. Bast's argument has indeed been reinforced by the Court's ruling in *Biocides* (pp. 167–168), but it remains controversial to claim that post-Lisbon implementing acts may amend legislative acts because this was also possible pre-Lisbon and because the institutions opted for an automatic alignment of the comitology procedures (p. 170). The author's reference to the amendment of Directive 2003/85 through implementing acts may actually prove the opposite, since that Directive has in the meantime been replaced by Directive 2016/429 which now prescribes delegated acts for the amendment of the Directives' annexes.

In Chapter 9, Craig critically reflects on the Lisbon reform in practice, arguing that much of the Treaty reform has been undone and the Commission's and Parliament's positions have suffered as a result (pp. 179–193). Surprisingly, Craig is congenial to the Court's ruling on Articles 290 and 291 in C-270/12, finding that there was force in the Court's reasoning (pp. 194–195). This would have merited some elaboration, since ESMA's contested power in this case allows it to adopt *de facto* implementing acts, but the Court still concluded that Article 291 TFEU is not being undermined. Craig then seems more critical of the role played by the ESAs in drafting delegated and implementing acts for the Commission, without going as far as qualifying this as unconstitutional. The chapter finishes with some interesting thoughts on the Commission and the agencies relying on soft law and adjudication to escape the framework of Articles 290 and 291 TFEU (pp. 199–201).

Bergström links Lisbon's reform of comitology with the new rules on *locus standi* under Article 263 TFEU and the Court's decisions in *Inuit* and *Microban*. The discussion is interesting and insightful, but the two subjects are treated rather separately, with the discussion of the admissibility rules in light of the Commission's rulemaking appearing as an afterthought.

The chapter by Mendes contains a lot of food for thought. Her central thesis is that under the new Lisbon framework (notably Art. 11 TEU), delegated and implementing acts are insufficiently democratically legitimized by the control exercised by Parliament and Council (pp. 235–241). Participation of interested parties in the decision-making is required, but is lacking today (pp. 243–245). Mendes suggests carefully elaborating the procedural framework in a way that the representation of interests in the decision-making procedure results in genuine participative democracy, which would incidentally also strengthen Parliament's scrutiny of the Commission (p. 249). As a result, Mendes strongly criticizes the Parliament's lack of attention to procedures for rule-making (rather than individual decision-making) in its resolution on a European Administrative Procedure Act (pp. 251–253). On one hand, some might argue that further proceduralization would not necessarily mean that the institutions will actually take account of the new input, but this cannot be an argument against proceduralization as such. On the other hand, proceduralization may also arise at the expense of efficiency, a risk not discussed as such by Mendes.

In the final chapter, the editors bring together and contrast the different perspectives and opinions expressed by the authors contributing to the volume. They also note that (non-legislative) rule-making by the Council also deserves more scholarly attention. An edited

volume on that topic meeting the standard set by the book presently under review would surely be welcome.

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